87-263

Supreme Court, U.S.
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AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

BERNICE JOHNSON

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

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Chief of the Criminal Division
Research, Training and Appeals

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QUESTIONS PRESENTED

I.

UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, MAY POLICE LAWFULLY PURSUE ONE FOR WHOM THEY HAVE AN ARREST WARRANT INTO THE DWELLING OF A THIRD PARTY?

II.

IS THE EXCLUSION OF EVIDENCE AN APPROPRIATE REMEDY UNDER THE FOURTH AMENDMENT WHERE THERE EXISTS NO TRUE CAUSAL NEXUS BETWEEN AN UNLAWFUL ENTRY AND THE SEIZURE OF EVIDENCE, AS WHERE POLICE, UNDER A GOOD FAITH MISAPPREHENSION OF THE LAW, MAKE A WARRANTLESS ENTRY INTO A DWELLING, SEE EVIDENCE IN PLAIN VIEW WHICH THEY COULD HAVE OBTAINED LEGITIMATELY BY PROCURING A SEARCH WARRANT, AND PROCEED TO OBTAIN A WARRANT BEFORE SEARCHING THE PREMISES?

III.

HAVE RECENT DEVELOPMENTS IN THE LAW OF CIVIL RIGHTS LIABILITY UNDERCUT THE DETERRENT RATIONALE FOR THE EXCLUSIONARY RULE ENOUGH TO JUSTIFY ITS ABOLITION AS A ROUTINE REMEDY FOR VIOLATIONS OF THE FOURTH AMENDMENT?

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IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN

OCTOBER TERM, 1986

v

BERNICE JOHNSON

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, Petitioner, through JOHN D. O'HAIR, Prosecuting Attorney for the County of Wayne, TIMOTHY A. BAUGHMAN, Chief of the Criminal Division, Research, Training, and Appeals, and JEFFREY CAMINSKY, Assistant Prosecuting Attorney, and prays that a writ of certiorari issue to review the

judgment of the Court of Appeals of the State of Michigan, entered in this cause on November 4, 1985, rehearing denied December 23, 1985, leave to appeal granted by the Michigan Supreme Court on June 24, 1986, and the order granting leave vacated and leave to appeal denied on June 17, 1987.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 146 Mich App 705; 381 NW2d 791 (1985), and appended below as Appendix A; the order of the court denying rehearing is unreported, and appended below as Appendix B. Michigan Court of Appeals Docket No.

70202. The order of the Michigan Supreme Court granting leave to appeal is reported at 425 Mich 871 (1986), and appended below as Appendix C; the order after argument vacating the earlier order and denying leave to appeal is unreported as yet, and appended below as Appendix D. Michigan Supreme Court Docket No. 78031.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on June 24, 1985, and denied rehearing on December 23, 1985. The Michigan Supreme Court entered judgment on June 17, 1987. This Court's jurisdiction is invoked under 28 USC, sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On January 21, 1981, the Detroit Police Department had in its possession a valid arrest warrant, charging one Joseph Junior Foster with a narcotics offense. Knowing that Foster often frequented a house owned by Respondent, police set up a surveillance in the vicinity of her house, waiting for Foster to arrive. Conditions in the neighborhood were icy and slippery.

When Foster pulled his car into Respondent's driveway, the police team converged and tried to arrest him. Using a key, Foster entered

Respondent's dwelling before the police could take him into custody; the record suggests that Foster was unaware that the police were trying to apprehend him, and that the police were too busy trying to keep from crashing into other vehicles on the street, or slipping on the ice, to call for him to halt, due to the condition of the road and sidewalks.

Two officers, Sgt. Joseph Piersante and Officer Henry Scott, arrived on the front porch seconds after Foster entered the dwelling, and followed him into the house. Scott arrested Foster a few feet inside the door, and Piersante moved past the two of them to secure the immediate area. Five or six feet down the hall, through an open bedroom door, he observed drug paraphernalia, including a

glass-bottom tray with white powder, a number of coin envelopes, measuring spoons and a triple beam scale. When backup officers arrived, Piersante sent Scott to obtain a search warrant for the house, while the rest of the police team secured the premises.

Ninety minutes later, Scott returned with the warrant, and police proceeded to enter and search the bedroom. A number of the items seized contained heroin, and Foster and Respondent were both charged with possession of heroin, with intent to deliver.

On April 13, 1982, the trial court denied the defendants' motion to suppress evidence obtained at the scene. On December 9, 1982, sitting without a jury, the trial court convicted both defendants as charged.

On November 4, 1985, the Court of Appeals reversed Respondent's conviction. The majority held that under this Court's decision in United States v Steagald, 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1983), the police could not enter Respondent's house without a search warrant; the dissent, citing Segura v United States,, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984), noted that securing a dwelling pending arrival of a search warrant did not constitute a search, and would have held that the police actions in arresting Foster and securing the premises were consistent with the holding in Steagald. On December 23, 1985, the Court of Appeals denied Petitioner's motion for rehearing, by the same majority vote.

On June 24, 1986, the Michigan Supreme Court granted Petitioner leave to appeal. On June 17, 1987, following briefing and argument, that court vacated its order of June 24, 1987, and denied leave to appeal, "for the reason that the Court is no longer persuaded that the questions presented should be reviewed by the Court."

REASONS FOR GRANTING THE WRIT

While this Court has often dealt with problems relating to arrests and related searches, it appears that the facts of this case skirt around the edges of all existing precedents of this Court. As the facts of this case suggest that the problems posed may recur, bench and bar across the

country would benefit from a concise pronouncement of this Court on the interrelationship between a lawful pursuit and a lawful entry into the house of a third party, whether or not this Court deems this case an appropriate one for further development of the "good faith," "inevitable discovery," or "independent source" doctrine. And, should this Court choose to reflect upon recent trends in the law of civil rights liability, it will find that most of the rationale for the exclusionary rule itself have vanished, and that the Court could take a giant step toward making law enforcement less sporadic, and the law itself less toothless, by making the concept of "reasonable search and seizure" a question of fact, and restricting application of the

exclusionary rule to those instances where official conduct is so outrageous that its toleration would be unconscionable in a court of law.

A.

In United States v Watson, 423 US 411; 96 S Ct 820; 46 L Ed 2d 598 (1976), this Court held that police may lawfully make a warrantless arrest in a public place, upon probable cause. In United States v Santana, 427 US 38; 96 S Ct 2406; 49 L Ed 2d 300 (1976), the Court held that hot pursuit justified a warrantless entry into a private dwelling, in order to apprehend a fleeing felon. See also, Warden v Hayden, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967). Thus, while recognizing the public's legitimate privacy interests in

passing unmolested in public, or in enjoying the privacy of one's own home, the Court recognized a need to accomodate the legitimate needs of law enforcement, and that the Constitution permitted the police to act without prior judicial approval -- at least in emergencies.

However, as in any free country, the State's legitimate needs were not without limits. And in Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980), this Court held that police could not enter a suspect's dwelling merely upon probable cause -- but that an arrest warrant alone would suffice to enter the suspect's own residence. Similarly, in United States v Steagald, 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1983), the Court held that an arrest warrant

alone would not suffice to enter a third party's dwelling -- but in speaking for the majority, Justice Marshall took care to note the limited nature of such a rule:

> "[T]he situations in which a search warrant will be necessary are few. As noted in Payton v New York, supra, an arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest. Furthermore, if probable cause exists, no warrant is required to apprehend a suspected felon in a public place. Thus, the subject of an arrest warrant can be readily seized before entering or after leaving the home of a third party. Finally, the exigent-circumstances doctrine significantly limits the situations in which a search warrant would be needed. For example, a warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive. Thus, to the extent that searches for persons pose special problems, we believe that the exigent-circumstances doctrine is adequate to accommodate legitimate law

enforcement needs." Steagald at 221.

Unfortunately, life is infinitely complex, and rarely bends to fit easily within the precedents of any court of law. In this case, seeking to execute a valid arrest warrant, the police undertook a brief pursuit to try to arrest Foster before he entered Respondent's dwelling -- an act which would have comported with Justice Marshall's notion in Steagald of "readily seiz[ing] a suspect before he reaches a dwelling. Once having committed themselves to such a course of action, however, it would be unreasonable -- and potentially dangerous -- to require them to stop mid-way through an attempted apprehension; and in any event, the rule in Santana and Hayden appears to permit police to follow a suspect they are pursuing into a dwelling. Even

so, Santana and Hayden both involved suspects who fled into their own homes -- which provides a basis for distinction, albeit one with no practical justification.

Thus, it appears that the Michigan courts erred in applying the existing precedents of this Courts -- reading the limitations of Payton and Steagald too broadly, and the grants of authority in Watson, Santana, and Hayden too narrowly. And since Michigan relied exclusively on Federal law to hold the entry to be unlawful, Petitioner asks this Court to correct this misunderstanding.

B.

Should this Court choose to inquire further into the matter, it will find that this case presents an opportunity to develop and clarify several nascent trends in the law.

Since Respondent cannot reasonably claim that the police had no basis for a search warrant, she cannot show any causal nexus between the claimed illegality and the resulting evidence -- simply put, since the police would have discovered the evidence inevitably in the due course of executing an easily obtainable search warrant, there is no reason to excuse Respondent from responsibility for her

crimes. Cf, Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984). If courts are to be arbiters of truth, there is simply no rational basis for excluding evidence simply because the police shows what hindsight shows to be the one wrong path, among many proper ones, in obtaining evidence of criminal conduct. And where the courts themselves have made the law insufficiently clear to eliminate the need for disagreements among lawyers -- or dissents among justices -- it makes no sense to suppress evidence obtained where the "correct" and "legal" course of action cannot be determined until well after the fact, and the police are doing their best to uphold the law as they understand it. This is particularly true where, as here, the police brought the matter

before a judicial officer as soon as practicable, and obtained a warrant to proceed as they did. Cf, Massachusetts v Shepard, 468 US 981; 104 S Ct 3424; 82 L Ed 2d 737 (1984); United States v Leon, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984). Those who would break the law are not, after all, entitled to perfection from the agents of the State; rather, they are entitled only to the State's best efforts.

In this context, it makes little sense to permit criminal defendants to subvert the true purpose of our Constitutional protections by quibbling over details -- details which neither excuse their acts, nor make evidence of their crimes inaccessible to the police. This

recalls Justice Cardozo's observation in Snyder v Massachusetts, 291 US 97, 121-122; 54 S Ct 330; 78 L ed 674; 90 ALR 575 (1934), that "to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them." The rule Petitioner sees would be a small extension of the inevitable discovery doctrine of Nix v Williams, supra, to require a true causal relationship between alleged official misconduct and the seizure of evidence -- limiting the reach of the exclusionary rule to those situations where the police could not lawfully have obtained the items seized.

C.

This Court has required the states to enforce an exclusionary remedy for violations of the Fourth Amendment since its decision in Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961),, which overruled the holding in Wolf v Colorado, 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949). However, recent developments in the law of civil rights liability, see, inter alia, Tennessee v Garner, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985); Malley v Briggs, 475 US ___; 106 S Ct ___; 89 L Ed 2d 271 (1986); City of Los Angeles v Heller, 475 US ___; 106 S Ct ___; 89 L Ed 2d 806 (1986); Donta v Hooper, 774 F2d 716 (CA 6, 1985); Jamieson v Shaw, 772 F2d 1205 (CA 5, 1985), have undercut the deterrent

rationale for the exclusionary rule, leaving its continuing validity open to debate, since there now exist numerous remedies for redress of constitutional grievances that do not involve suppressing evidence of guilt.

While this issue has not been raised below, this Court is the only forum which has the power to reexamine the propriety of the exclusionary rule as a remedy. For this reason, this Court is Petitioner's first appropriate forum to advance the argument for its abolition. And while recognizing that the weight of precedent is often compelling, Petitioner submits that the current state of the law does not require an exclusionary remedy to vindicate the legitimate interests protected by the Fourth Amendment, and that this Court

would do much to restore public confidence in the administration of justice by abolishing the exclusionary rule as a general remedy for violations of the Fourth Amendment. As Chief Justice Burger has noted, "the exclusionary rule has been operative long enough to demonstrate its flaws," and it is now time "to modify its reach, even if it is retained for a small and limited category of cases." Stone v Powell, 428 US 465, 496; 96 S Ct 3037; 49 L Ed 2d 1067 (1976)(Burger, CJ, concurring.)

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

JOHN D. O'HAIR
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals

JEFFREY CAMINSKY (P27258)
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Phone: (313) 224-5846

Dated: July 20, 1987

JC/hdm

APPENDIX

APPENDIX "A"

COURT OF APPEALS OPINION

November 4, 1985

FOR PUBLICATION

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 70202

v

BERNICE JOHNSON,
Defendant-Appellant.

Before: V.J. Brennan, P.J., Cynar and J.W. Fitzgerald,* JJ.

PER CURIAM

Defendant was convicted of possession of heroin with intent to deliver in violation of MCL 333.74012a; MSA 14.15(7401) after a bench trial in Detroit Recorder's

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*Retired Supreme Court Justice sitting on the Court of Appeals by assignment.

Court. She was sentenced to 3 1/2 to 20 years in prison. Defendant appeals her conviction to this court as of right.

The record indicates that on January 21, 1981, there was a valid arrest warrant outstanding on Joseph Junior Foster. Two Detroit police officers, Joseph Piersante and Henry Scott, saw Foster enter the defendant's residence at 4226 Grayton in the City of Detroit. The officers followed him into the house. Officer Scott entered the premises first and Piersante followed him. Scott arrested Foster a few feet inside the door. Piersante moved past them to secure the immediate area. Five or six feet down the hall he observed drug cutting and packaging paraphernalia in a bedroom to which the door was open. There was

also a tray with a glass bottom with white powder on it, a number of coin envelopes, a triple beam scale and measuring spoons. Piersante requested that Scott go and obtain a search warrant for the house. Neither officer had entered the bedroom at that time. Four to six other officers waited with Piersante to secure the premises. Two people, one of whom was the defendant, were found in the house. About ninety minutes later Scott returned with the warrant. At that time the police finally entered the bedroom and the narcotics in question were seized. Officer Scott's testimony corroborated the testimony of Piersante. A third police officer, Wallace Jezewski, testified to substantially the same facts although he said that Scott or Piersante may have entered the bedroom.

A suppression hearing was held on April 13, 1982. Foster and defendant sought to suppress the evidence obtained from the scene. The motion to suppress was subsequently denied.

Foster and the defendant were tried together. Both of them testified at their trial and confirmed that Foster was arrested a few feet inside the hours. They denied any knowledge of the drugs found in the house. It was stipulated that a number of exhibits contained heroin.

Defendant claims that the evidence should have been suppressed because it was the subject of an illegal search. The parties do not contest the validity of the arrest warrant or the execution of the arrest warrant at the

time they entered the house. The officers had gone to the house on Grayton in order to arrest Foster. Scott and Piersante were the first persons to arrive at the house and arrested Foster immediately.

The issue is whether the search of the third party's home was an illegal search. Our reading of United States v Steagald, 451 US 204; 101 SCt 1642; 68 L Ed 2d 38 (1983) convinces us that the search was indeed illegal and that the evidence should have been suppressed.

In Steagald the police had an arrest warrant for a man named Lyons but went to the home of a third party rather than to the home of a person named on the warrant. They entered the third party's home, found

incriminating evidence and prosecuted the third-party homeowner. This is exactly the situation that we are faced with here. In Steagald the Supreme Court held that a search warrant was necessary in such instances because an arrest warrant for another person did not justify the search of a third party's home. Steagald applies to the facts of this case. The evidence should have been suppressed; the conviction must be reversed.

Defendant's other claim, regarding the prosecution's failure to present a res gestae witness, was not preserved by a timely motion before trial. People v Robideau, 94 Mich App 663; 289 NW2d 846 (1980), aff'd 419 Mich 458 (1984). It is the accused's responsibility to move for a hearing

during trial or for a new trial prior to seeking appellate review. People v LeFlore, 96 Mich App 557; 293 NW2d 628 (1980), lv den 409 Mich 927 (1980). The defendant has not met either of these prerequisites. We therefore decline to address this issue on appeal.

Reversed.

/s/ Walter P. Cynar

/s/ John W. Fitzgerald

COURT OF APPEALS OPINION

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Docket # 70202

v

BERNICE JOHNSON,

Defendant-Appellant.

BEFORE: V.J. Brennan, P.J., and Cynar and J.W. Fitzgerald,* JJ. V.J. Brennan, P.J., Dissenting

I respectfully dissent.

From these facts, I would find the search here to be valid and find that the denial of the suppression motion was proper. For a valid search warrant to be issued, an affidavit has

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*Retired Supreme Court Justice sitting on the Court of Appeals by assignment.

to be executed. The affidavit for a search warrant requires the officer making the arrest to have probable cause as to what the search will produce. Here, during a valid arrest of a third party and the securing of the area, the officers saw drugs and drug paraphernalia. This established the probable cause. They then sent for a search warrant and did not search the home of the third party until the warrant arrived.

We can distinguish Steagold v U.S., supra, relied upon by the majority.

In Steagold, there was a search of the third party's home before the warrant arrived. That did not occur here.

Defendant claims that securing the premises amounted to a search. The United States Supreme Court in Segura v U.S. 104 S Ct Rep at 3389 said:

> "We hold, therefore, that securing a dwelling, on the basis of probable cause to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."

Here, we had a valid arrest, we had proper securing of the premises; we have the search after a valid search warrant was issued.

The evidence was properly admitted.

I would affirm.

/s/ Vincent J. Brennan

APPENDIX "B"

COURT OF APPEALS ORDER DENYING REHEARING

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Twenty-third day of December in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable

VINCENT J. BRENNAN
Presiding Judge

WALTER P. CYNAR
JOHN W. FITZGERALD
Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v Docket #70202
L.C. #8100509

BERNICE JOHNSON,
Defendant-Appellant.
_____/

In this cause a motion for rehearing is filed by plaintiff-appellee and no answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be and the same is hereby DENIED.

Judge Vincent J. Brennan would grant the motion for rehearing.

STATE OF MICHIGAN -- ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 10th day of January in the year of our Lord one thousand nine hundred and eighty-six.

/s/ Corbin R. Davis

Chief Clerk

APPENDIX "C"

MICHIGAN SUPREME COURT
ORDER GRANTING LEAVE

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of June in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 78031
COA: 70202
LC: 81-00509

BERNICE JOHNSON,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is GRANTED.

The defendant shall file with the Recorder's Court for the City of Detroit an affidavit concerning her present financial status (see guidelines at 387 Mich xxxi). The prosecutor shall be furnished a copy of the financial affidavit and may challenge the defendant's assertion of indigency within 21 days after receiving the affidavit. The challenge, if brought, shall be resolved at a hearing before the Recorder's Court for the City of Detroit at which the prosecution, the defendant, and an attorney designated to represent the defendant at the hearing shall appear personally to aid

the court's inquiry. The Recorder's Court for the City of Detroit, on a finding of indigency, shall appoint the City of Detroit, on a finding of indigency, shall appoint counsel for the defendant and shall furnish any portion of the record counsel may require.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 24th day of June in the year of our Lord one thousand nine hundred and eighty-six.

/s/ Corbin R. Davis Clerk.

Seal

APPENDIX "D"

MICHIGAN SUPREME COURT ORDER DENYING LEAVE

AT A SESSION OF THE SUPREME COURT OF THE UNITED STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 17th day of June in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable:

DOROTHY COMSTOCK RILEY,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENIIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

12 May 87

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BERNICE JOHNSON,

Defendant-Appellee.

SC:	78031
COA:	70202
LC:	81-00509

On order of the Court, leave to appeal having been granted and the Court having considered the briefs and oral arguments of the parties, the order of June 24, 1986, granting leave to appeal is VACATED and leave to appeal is DENIED for the reason that the Court is no longer persuaded that the questions presented should be reviewed by the Court.

Boyle, J., states:

"I would remand to the trial court for a determination as to co-defendant Foster's connection with the premises. See Steagald v United States, 451 US 204, 230-231 (1981). Steagald precludes entry and search of the premises of 'a third party' on the basis of an arrest warrant for another subject, absent consent or exigent circumstances. I would retain jurisdiction."

STATE OF MICHIGAN--ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of June in the year of our Lord one thousand nine hundred and eighty-seven.

/s/ Corbin R. Davis ,Clerk.

Seal

Supreme Court, U.S.
FILED
SEP 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-263 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

v.

BERNICE JOHNSON,
Respondent.

ANSWER IN OPPOSITION TO PETITION TO WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Lower Court Entitlement:

PEOPLE OF THE STATE OF MICHIGAN

v.

BERNICE JOHNSON

Detroit Recorder's Court No. 80-1745
Michigan Court of Appeals No. 70202
Michigan Supreme Court No. 78031

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QUESTION PRESENTED FOR REVIEW

Should Michigan appellate courts be affirmed in their exclusion of evidence where police entered Respondent's home on a pretext, without search warrant or consent and in violation of state statute, to serve an arrest warrant upon an invitee, and further searched without cause or justification after arrest?

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO MICHIGAN COURT OF APPEALS

NOW COMES Respondent, BERNICE JOHNSON, through her attorney, DOMNICK J. SORISE, and respectfully requests that this Honorable Court deny writ of certiorari to review the judgment and opinion of Michigan Court of Appeals entered in this case on November 4, 1985, and rehearing denied on December 23, 1985; and the judgment and order of Michigan Supreme Court leave to appeal granted on June 24, 1986, and order granting leave to appeal vacated and leave to appeal denied on June 17, 1987.

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OPINIONS BELOW

Opinion of Michigan Court of Appeals is reported at 146 Mich App 705; 381 NW2d 791 (1985), and contained in Petition for Writ of Certiorari as Appendix A (1a-10a).

Order of Michigan Court of Appeals is unreported under Docket No. 70202, and contained in Petition as Appendix B (11a-13a).

Order of Michigan Supreme Court granting leave to appeal is reported at 425 Mich 872; ____ NW2d ____ (1986), and contained in Petition as Appendix C (14a-17a).

Order of Michigan Supreme Court, after briefing and oral argument, vacating order granting leave to appeal and denying leave to appeal is reported at 428 Mich 902; ____ NW2d ____ (1987), and contained in Petition as Appendix D (18a-20a).

Additionally, the oral findings of fact and verdict of the trial court were transcribed under Detroit Recorder's Court No. 80-1745, and are contained in this Answer in Opposition to Petition in Appendix (A1-A2).

STATEMENT OF JURISDICTION

Respondent does not disagree with Statement of Jurisdiction as made by Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent does not disagree with constitutional provisions involved as made by Petitioner.

STATEMENT OF CASE

At preliminary examination and again at evidentiary hearing on motion to suppress evidence, Respondent Bernice Johnson objected to police entry and search of her home to serve an arrest warrant on an invitee, Joseph Junior Foster, who was later charged and convicted as a co-defendant. Respondent maintained throughout the proceedings that police entry was illegal; that police used the arrest warrant for Foster as a pretext to enter and search her home; that police entry into her home was made in violation of the state knock-and-wait statute; and that police action in further searching throughout her home after arresting Foster was unjustified and unlawful.

The prosecution did not assert good faith, inevitable discovery, or any other theory of exemption from the exclusionary rule at the state trial level or in the Michigan Court of Appeals. The prosecution first asserted good faith in its application for leave to appeal to the Michigan Supreme Court, and did not assert inevitable discovery until its brief on appeal in the Michigan Supreme Court.

Respondent and Foster were found guilty as charged of possession with intent to deliver heroin [MCLA 333.7401(2)(a); MSA 14.15 (7401)(2)(a)] in a bench trial before Honorable Vera Massey Jones in Detroit Recorder's Court. The trial judge specifically found in her rendering of the verdict that police entry into Respondent's home to arrest Foster was a "subterfuge" to search her home, but felt bound by the ruling of a pretrial judge:

> "THE COURT: Listening to the arguments has brought back the evidence, the things that I had noted. I now remember the things that I had written down primarily in my notes as being of importance. I have listened to all of the testimony, listened to all of the witnesses testify. Another Judge of this building ruled on whether or not the evidence was legally or illegally seized and I do not have the authority to change that ruling. They found that it was legally seized. I don't know what that Judge heard. He could have heard

totally different testimony than what I heard, I don't know. *I do know that based on the testimony that I heard I am convinced it was subterfuge*, but it doesn't really (226) matter because I don't get to answer that question. I think the most honest witness was Officer Scott, who testified that he had to walk down the hall and look in the room before he could see the narcotics and narcotics paraphernalia. I looked at the drawing on the board and I tried to figure out myself how a person could stand a few feet in the hallway and see into this room that was off to one side. I had believed that it was impossible and Officer Scott said no, he had to walk down there and look in, and that makes sense to me, but I don't get to decide that issue. What I get to decide here is whether or not the defendants are guilty of possessing with the intent to deliver heroin." (A1-A2) (emphasis added).

Co-defendant Foster and Respondent were arrested at Respondent's home at 4226 Grayton in Detroit, Michigan on January 21, 1981. Detroit Police had obtained a felony arrest warrant for Foster four days earlier on January 17, 1981. The arrest warrant was for a narcotics offense, and Foster had apparently been released pending chemical analysis, warrant authorization, and notification.

Police assembled four cars and two crews, and went to the area of 4226 Grayton specifically to serve the arrest warrant on Foster. Police had knowledge Foster frequented the Grayton residence, and set up surveillance around the area. Police knew Foster's car.

Police also knew Foster frequented other locations and had Foster's home and work addresses. The arrest warrant itself had an address, not on Grayton, for Foster. One police officer testified that he had arrested Foster on two occasions during the previous month, but the locations of arrests were not checked in an effort to serve the instant arrest warrant on Foster.

Police testimony further established that police had the Grayton residence under surveillance on prior dates and that there

were written reports of the surveillance. Police had prior knowledge that Respondent, not Foster, owned the Grayton residence.

When Foster arrived in the area of the Grayton residence, all police units were radioed to the address. Foster appeared to be using a key for entrance, and gained entrance to the residence, as police arrived in unmarked cars. Police attributed their inability to physically prevent Foster's entrance into the residence to winter street conditions, but police did not attempt to announce their presence, order Foster to halt, or call out to Foster in any manner prior to his entrance into the residence.

Within seconds after Foster's entrance, police proceeded to the front porch of Respondent's home, opened the exterior screen door, and then pushed open the interior door. The lead officer did not recall whether police presence was announced before or after entrance. Foster testified that police forced open the interior door with a ram. Three police officers immediately entered Respondent's home and other officers quickly followed.

Foster was in the front entrance hallway within five feet of the front door and in the process of taking off his coat. All testimony indicated that Foster was not aware of police presence or activity until this point. The lead officer called Foster by name and informed him of their purpose to arrest him. Foster acknowledged and submitted with a simple "Okay". All testimony indicated that Foster presented no problem whatsoever to arrest.

The second or third entering police officer made sure the lead officer was having no difficulty, and then went down the front hallway past Foster, around to an adjacent hallway, and down that hallway a distance to a bedroom — where, his testimony indicated, the door was open and narcotics and paraphernalia were in plain view. Police secured the premises and arrested Respondent near the front hallway. An officer left to obtain a search warrant for Respondent's home and returned about an hour later with the warrant. The affidavit in support of search warrant was based entirely upon observations made by police after entry into Respondent's home and Foster's arrest (A3-A4).

Pursuant to the search warrant, police seized narcotics, paraphernalia, and other incriminating evidence, which were admitted against Respondent over objections, and resulted in conviction as charged on December 9, 1982, and in sentence of three to 20 years imprisonment on December 22, 1982.

In a split *per curiam* opinion dated November 4, 1985, the Michigan Court of Appeals reversed Respondent's conviction, holding that police entry and search of a third party (Respondent's) residence were not legal pursuant to an arrest warrant for Foster. *People* v. *Bernice Johnson*, 146 Mich App 705; 381 NW2d 791 (1985). The majority which included former Michigan Supreme Court Justice J. W. Fitzgerald sitting by special assignment, relied on *Steagald* v. *United States*, 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1981). The dissenting judge distinguished *Steagald* and relied on *Segura* v. *United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984) as follows:

> "We can distinguish *Steagald* v. *United States*, *supra*, relied upon by the majority. In *Steagald*, there was a search of the third party's home before the warrant arrived. That did not occur here.
>
> Defendant claims that securing the premises amounted to a search. The United States Supreme Court in *Segura* v. *United States*. 468 US ____, ____; S Ct 3380, 3389; 83 L Ed 2d 599, 612 (1984), said:
>
> "We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."

In an order dated January 10, 1986, the Michigan Court of Appeals, "no answer in opposition thereto having been filed", denied prosecution's motion for rehearing, again over dissenting vote. Respondent was represented by appointed counsel throughout proceedings in the Michigan Court of Appeals.

On or about January 24, 1986, the prosecution filed application for leave to appeal in the Michigan Supreme Court. Appointed counsel having filed no answer in opposition, Respondent retained present counsel on or about April 18, 1986, and counsel filed answer in opposition on or about May 14, 1986.

In an order dated June 24, 1986, the Michigan Supreme Court granted prosecution leave to appea' *People* v. *Bernice Johnson*, 425 Mich 872; ____ NW2d ____ (1986). In an order dated June 17, 1987, after full briefing and oral argument, the Michigan Supreme Court vacated order granting leave to appeal and denied leave to appeal "for the reason that the Court is no longer persuaded that the questions presented should be reviewed by this Court". *People* v. *Bernice Johnson*, 428 Mich 902; ____ NW2d ____ (1987).

REASONS FOR DENYING WRIT

Police entered Respondent's home, without a search warrant or consent or exigent circumstances, to serve a four-day old arrest warrant on Joseph Junior Foster. Upon unsupported claims of self-protection, police searched Respondent's home after arrest beyond the area of arrest, and further claimed observation of contraband in open and plain view. Police subsequently obtained a search warrant for Respondent's home, based entirely upon observations after entry to Respondent's home and arrest of Foster (A3-A4).

A. THE PRETEXT

The trial judge was convinced and found that police used the outstanding arrest warrant for Foster as "subterfuge" to enter and search the home of Respondent, but felt bound by a pretrial ruling at an evidentiary hearing (A1-A2). The trial judge was not strictly bound by the pretrial ruling under state law because she was privy to a more extensive record at trial. See, *People* v. *Alajos*, 397 Mich 629, 634-635; 246 NW2d 828 (1976); *People* v. *Sacorafas*, 76 Mich App 370, 373-374; 256 NW2d 599 (1977). Clearly, "[a]n arrest may not be used as a pretext to search for evidence". *United States* v. *Lefkowitz*, 285 US 452, 467; 52 S Ct 420; 76 L Ed 877 (1932); *People* v. *Gonzales*, 356 Mich 247, 257; 97 NW2d 16 (1959).

In light of prior police investigation, knowledge, familiarity and positioning, along with their number, prosecution claim that police were physically unable to make Foster aware of their presence and purpose before he parked his car, walked to Respondent's home and entered her home with the use of a key, is simply untenable. See, *United States* v. *Becker*, 485 F2d 51, 53-59 (6th Cir, 1973) (McCree, CJ, dissenting). It does not take much to conclude, as the trial judge did, that police harbored suspicions about Respondent's home, had a desire to enter and search the home, and waited for Foster to enter the home to execute an outstanding arrest warrant on him. This threshold problem of pretext was raised throughout the proceedings below, but is not addressed or mentioned by the prosecution in its petition to this

Court. Pretext undermines, if not destroys, the various claims of good faith law enforcement and sweeping benefits sought by the prosecution. Pretext is also adequate and independent ground to deny certiorari under state or federal jurisprudence.

B. UNLAWFUL POLICE ENTRY

As devastating as facts and factual findings of pretext may be to the prosecution, such is not necessary to find that police entry into Respondent's home without a search warrant to arrest Foster and their subsequent search and seizures from her home after arrest of Foster, were illegal. This case does not "skirt around the edges of all existing precedents of this Court", as presented by the Petition, at p. 13. Police action in this case crossed a clearly marked line and violated established precedent. This court stated "the Fourth Amendment has drawn a firm line at the entrance to the house", in specifically holding that a search warrant was additionally required to authorize police entry into the home of another to arrest the subject of an arrest warrant. *Steagald* v. *United States*, 451 US 204, 212; 101 S Ct 1642, 68 L Ed 2d 38, (1981). A "significant potential for abuse" was outlined by this Court and recognized by the government. Police could employ an arrest warrant for one individual to "search all the homes of that individual's friends and acquaintances" or "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place". *Stegald* v. *United States*, supra at US 215-216 (citation, footnote omitted).

Police acted illegally by pushing or ramming in the door to Respondent's home, and then entering or invading her home without a search warrant. Abuse visualized was realized in the factual findings of the trial judge (A1-A2). These violations, in turn, led to further police claims (need to assist fellow officer, need to protect fellow officer) and greater invasions (around corner, down hallway, to bedroom, and then throughout the home). And, so it goes. It takes not leaps and bounds. Constitutional rights in one's own home can be violated and eroded just as surely by inching maneuvers. Mr. Justice Bradley warned long

ago that it is "silent approaches and slight deviations" from which "illegitimate and unconstitutional practices" become established. *Boyd* v. *United States*, 116 US 616, 635; 6 S Ct 524; 29 L Ed 746 (1886).

It may be difficult for police to understand and accept that they cannot arrest an individual on an outstanding arrest warrant merely because the individual is five feet inside the closed door of another's home. However, it must be understood and accepted that police cannot create the circumstances, force an exigency, and then cry need. See, *United States* v. *Hare*, 589 F2d 1291, 1295 (6th Cir, 1979); *United States* v. *Thompson*, 700 F2d 944, 950 (5th, Cir, 1983).

Any reliance by the prosecution on *Segura* v. *United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1982) is misplaced because the case is clearly distinguished. This Court initially noted that the district court and the court of appeals both ruled that "the initial warrantless entry, and the limited security search were not justified by exigent circumstances and were therefore illegal", and accordingly narrowed the issue to whether the evidence, not observed in plain view during the initial entry but discovered upon the subsequent search warrant, was obtained by sufficiently distinguishable means to be purged of the prior illegality. *Segura* v. *United States*, supra at S Ct 3384-3386. This Court held that the subsequent search warrant was so purged because "the information which the warrant was secured" came "from sources wholly unconnected with the entry and was known to the agents well before the initial entry". *Segura* v. *United States*, supra at S Ct 3391. Here, the affidavit in support of search warrant was based entirely upon information obtained by the initial illegal entry (A3-A4).

C. STATUTORY VIOLATION

Police entry was also illegal because police did not knock, announce presence or wait for a response before pushing or breaking their way through the door into the home of Respondent, in violation of the state statutory mandate of MCLA 764.12; MSA 28.880. It matters not whether police pushed open an

unlocked door or crashed the door with a ram because such statutes, designed to incorporate fundamental values, are applicable whenever police enter without valid permission. *Sabbath* v. *United States*, 391 US 585, 586-590; 88 S Ct 1755; 20 L Ed 2d 828 (1968). Considering also that "reduction of potential violence to both occupants and police arising from the unannounced entry" is one rationale underlying knock-and-wait statutes [*State* v. *Coyle*, 95 Wash 2d 1; 681 P2d 1256, 1258 (1980)], it would not be, as asserted by the Petition, at p. 18, "unreasonable — and potentially dangerous — to require them to stop mid-way through an attempted apprehension".

Moreover, the record establishes no exigent circumstances justifying police failure to comply with statute. Police had no reason to believe that Foster was armed or would otherwise pose a danger. Police, having arrested Foster on two occasions during the previous month, offered no tales of danger, resistance, or difficulty. Police offered no reason to believe that there were narcotics at the residence or any evidence of other crimes which would be in danger of destruction upon an announcement for entry. There was certainly no immediacy as the arrest warrant for Foster was four days old, and the charged offense probably older if Foster were released to appear pending notification of chemical analysis and warrant authorization, as is customary on narcotics arrests. Additionally, the record does not establish that "facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture". *Miller* v. *United States*, 357 US 301, 310; 78 S Ct 1190; 2 L Ed 2d 1332 (1958). Indeed, the Petition, at p. 10, concedes "the record suggests Foster was unaware that the police were trying to apprehend him". This concession, along with the circumstances surrounding the warrant itself, would appear to undercut the hints of hot pursuit.

D. FURTHER UNWARRANTED POLICE ACTION

Over and above these transgressions, police entry and movement in Respondent's home should have stopped in the front hallway area where Foster was very cooperative and posed no

problem, according to all accounts by the police who arrested him. "None whatsoever" was the characterization given by the lead officer upon being asked whether Foster posed any difficulty during the arrest. Extended movement by police throughout Respondent's home was not justified by claims to secure the immediate area or to conduct a protective sweep, because there was a failure to show a strong and demonstrable potentiality for danger. *United States* v. *Morgan*, 743 F2d 1158, 1161-1162 (6th Cir, 1984). General statements about the danger of narcotics trafficking were not presented at the trial level, and are not sufficient after-the-fact. *United States* v. *Hatcher*, 680 F2d 438, 444 (6th Cir, 1982). Protective sweep measures constitute searches within the meaning of the Fourth Amendment. *Hester* v. *United States*, 265 US 5; 44 S Ct 445; 68 L Ed 898 (1924).

E. BELATED, UNSUPPORTED EXEMPTIONS

Exemption by means of inevitable discovery or good faith should not be allowed because such claims were not properly raised below. *Steagald* v. *United States*, supra at US 208-211. Further, inevitable discovery is not supported by a record which shows that police did not actively pursue a search warrant prior to illegal entry into Respondent's home. *United States* v. *Satterfield*, 743 F2d 827, 846 (11th Cir, 1984). Nor is good faith or abrogation of the exclusionary rule supported by a record which contains a finding of subterfuge by police.

CONCLUSION

For the above reason, Respondent respectfully requests that this Honorable Court deny Writ of Certiorari in the above case.

Respectfully submitted,

DOMNICK J. SORISE
Attorney for Respondent
24001 Greater Mack, Suite A
St. Clair Shores, MI 48080
(313) 776-0700

Dated: September 11, 1987

RESPONDENT'S APPENDIX

FINDINGS AND VERDICT OF TRIAL COURT

THE COURT: Listening to the arguments has brought back the evidence, the things that I had noted. I now remember the things that I had written down primarily in my notes as being of importance. I have listened to all of the testimony, listened to all of the witnesses testify. Another Judge of this building ruled on whether or not the evidence was legally or illegally seized and I do not have the authority to change that ruling. They found that it was legally seized. I don't know what that Judge heard. He could have heard totally different testimony than what I heard, I don't know. I do know that based on the testimony that I heard I am convinced it was subtefuge, but it doesn't really (226) matter because I don't get to answer that question. I think the most honest witness was Officer Scott, who testified that he had to walk down the hall and look in the room before he could see the narcotics and narcotics paraphernalia. I looked at the drawing on the board and I tried to figure out myself how a person could stand a few feet in the hallway and see into this room that was off to one side. I had believed that it was impossible and Officer Scott said no, he had to walk down there and look in, and that makes sense to me, but I don't get to decide that issued. What I get to decide here is whether or not the defendants are guilty of possessing with the intent to deliver heroin.

Now, it's been a lot of evidence introduced in this case. I think one of the most telling things besides the narcotics was the exhibit. I don't know the number now because I don't have my notes, but there was a large cardboard box brought into this courtroom and when the officer opened that box I could see puffed up coin envelopes, a large number of them, I mean a whole lot more than 50 or 60 coin envelopes. I cannot believe that if the police wanted to frame somebody that they would go through that much trouble, that is too many coin envelopes for them to fool around and puff up. Therefore, it becomes quite obvious that the person intended to use those envelopes, whoever was in possession of the heroin to distribute the narcotics, that is to deliver (227)

narcotics. So the question comes down to who in fact was in possession and control of the items found.

Miss Bernice Johnson is obviously the owner of the home, she was in possession and control of the home. She would have had to know what was in her home. And we are suddenly led to believe there was a whole lot of people coming in and out of there. This was a single residence, as I understand it, and from the testimony there might have been a workman there, there might have been people coming in for a party, but the testimony evidences that Bernice Johnson lived there, she was in possession and control of the premises, she was therefore in possession and control of the narcotics and intended to deliver that heroin.

The real question becomes Mr. Foster's role. Mr. Foster opened the door with a key. He admits he has the right to come and go as he pleases, he has full run of the premises, he is there on a lot of occasions, a large number of occasions. He knows there is work being done, he has cooked in the kitchen. Then he tells the story about his car and material that was found in his car, and, it doesn't ring true to me. I am convinced based on the evidence before me that Mr. Foster was in joint control and possession of this heroin with Miss Johnson, and they both intended to deliver same. They are guilty as charged. There will be a remand in this case.

Search Warrant

SEARCH WARRANT

State of Michigan

SS

County of Wayne

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

On this day Henry C. Scott, affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place: The entire premises of 4226 Grayton. 4226 Grayton is described as a single story brick ranch type dwelling. 4226 Grayton is located on the East side of Grayton and is the fifth (5th) building South of Waveney and is located in the City of Detroit, County of Wayne, State of Michigan.

to seize, secure, tabulate and make return according to law the following property and things:

Heroin, any other controlled substances, and any items used in the sale, distribution or manufacture of any controlled substances and any items or papers indicating proof of ownership or residence or control of the above described premises, and any suspected narcotic proceeds.

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

1. The affiant is a member of the Detroit Police Department working in conjunction with other members of the Detroit Police Narcotic Section regarding the arrest of one Joseph Junior Foster on outstanding felony arrest warrant #81-00344 for VCSA.

2. The affiant and other officers observed Mr Foster enter the above described premises of 4226 Grayton by using a key. The

affiant went to the front door knocked on same and rang the door bell. After a short time and receiving no responce at the door the affiant opened the door which was ajar. The affiant observed Mr Foster standing in the hallway directly in front of the door. The affiant instructed Mr Foster not to move and the affiant approached Mr Foster and informed him that he was under arrest for VCSA and affiant showed Mr Foster the warrant number. The affiant was advising Mr Foster of his rights when Sgt Piersante told the affiant to wait a minute because what appeared to be cutting and packaging materials were visible in an adjacent room to the hallway inwhich we were standing. Sgt Piersante could see into the open doorway and observed two (2) boxes one of which contained a LARGE amount of opened and ready for packaging manila coin envelopes, stamp pad, stamp (of a human eye), scale, mixer, glass cutting board with what appeared to be a powdery substance on the surface and what appeared to be a number of already sealed coin envelopes. Sgt. Piersante ordered the premises secured pending the issuance of a search warrant.

ISSUED UNDER MY HAND THIS 21st DAY OF January 1981.

/s/ DALTON A. ROBERSON
RECORDERS COURT FOR THE
CITY OF DETROIT

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-263

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN
PETITIONER

v

BERNICE JOHNSON
RESPONDENT

REPLY BRIEF TO ANSWER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
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Research, Training and Appeals

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QUESTIONS PRESENTED

I.

UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, MAY POLICE LAWFULLY PURSUE ONE FOR WHOM THEY HAVE AN ARREST WARRANT INTO THE DWELLING OF A THIRD PARTY?

II.

IS THE EXCLUSION OF EVIDENCE AN APPROPRIATE REMEDY UNDER THE FOURTH AMENDMENT WHERE THERE EXISTS NO TRUE CAUSAL NEXUS BETWEEN AN UNLAWFUL ENTRY AND THE SEIZURE OF EVIDENCE, AS WHERE POLICE, UNDER A GOOD FAITH MISAPPREHENSION OF THE LAW, MAKE A WARRANTLESS ENTRY INTO A DWELLING, SEE EVIDENCE IN PLAIN VIEW WHICH THEY COULD HAVE OBTAINED LEGITIMATELY BY PROCURING A SEARCH WARRANT, AND PROCEED TO OBTAIN A WARRANT BEFORE SEARCHING THE PREMISES?

III.

HAVE RECENT DEVELOPMENTS IN THE LAW OF CIVIL RIGHTS LIABILITY UNDERCUT THE DETERRENT RATIONALE FOR THE EXCLUSIONARY RULE ENOUGH TO JUSTIFY ITS ABOLITION AS A ROUTINE REMEDY FOR VIOLATIONS OF THE FOURTH AMENDMENT?

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ADDITIONAL REASONS FOR GRANTING THE WRIT

In his opposing brief, Respondent advances the claim that the police entry into her dwelling was, in some way, based upon a "pretext" of arresting the man whom they chased into the house, and chastises Petitioner for failing to address this point in the original petition. Though based upon dicta in the trial court's findings of fact, this claim is without any logical or factual basis, and Petitioner did not address the point in the Petition because it is both frivolous and untenable.

If the chase of Foster into the dwelling was indeed a pretext -- and the police fully intended to use the

warrant as a means to enter Respondent's house -- they had a perfectly legitimate means of effecting the entry: knowing that Foster would be arriving, police could have prepared the warrant ahead of time, radioed Foster's arrival, and entered the dwelling quite legally, without the need for the mad dash across the ice and snow that made their pursuit of Foster more akin to one found in the "Keystone Kops" than the "French Connection." Thus, we are confronted with an situation little recognized by the judiciary, but common enough in real life: if the facts were as the defendant insists, the police conduct would be unchallengeable, because the conscious intent she claims existed would have rendered their actions

well-planned and above reproach; but because real life is chaotic rather than planned, the scrambling and scampering which the record discloses eliminates the chance that the police actions were anything but spontaneous. Moreover, the entire question of "pretext" is -- and should be -- quite beside the point: properly put, the question should be whether the law allows the police to act as they did, not whether the record conclusively proves that their intentions reveal the purity of saints.

In any event, the judge ruling on the suppression motion found no merit to such claims of "pretext," and Respondent cannot claim that this Court should credit another judge's contrary opinion. Thus,

this Court may safely dismiss Respondent's claim of "pretext," and proceed to consider the more interesting issues presented in the Petition.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

Respectfully submitted,

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Dated: September 17, 1987

JC/hdm